Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States
October Term, 2003

ISABEL HERNANDEZ, et. al.,
Petitioners,

v.

EL PASO ENERGY CORPORATION
(Now Known as EL PASO CORPORATION), et. al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A FINDING THAT THE ADMINISTRATOR'S INTERPRETATION OF AN ERISA PLAN IS LEGALLY CORRECT IF THE TRUSTEE'S INTERPRETATION IS FAIR AND REASONABLE NECESSARILY COMPLIES WITH THE ANALYTICAL FRAMEWORK REQUIRED IN A DE NOVO STANDARD OF REVIEW.

No.

In the

Supreme Court of the United States

October Term, 2003

ISABEL HERNANDEZ
FOR HERSELF AND ON BEHALF OF
HECTOR HERNANDEZ' ESTATE

Petitioners,

v.

EL PASO ENERGY CORPORATION (NOW KNOWN AS EL PASO CORPORATION), AND THE EL PASO NATURAL GAS COMPANY EMPLOYEE SEVERANCE PROTECTION PLAN

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Isabel Hernandez, Plaintiff – Petitioner

El Paso Energy Corporation (Now Known as El Paso Corporation), and The El Paso Natural Gas Company Employee Severance Protection Plan, Defendant – Respondent.

Law Office of Justo Fernandez-Gonzalez, 521 Texas Ave., El Paso, Texas 79901, Plaintiff's trial and appellate counsel.

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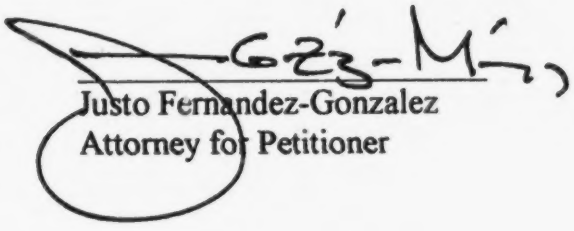

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Attorney for Petitioner

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No.

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EL PASO ENERGY CORPORATION
(Now Known as EL PASO CORPORATION), et. al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ISABEL HERNANDEZ, et. al., Petitioner, herein prays that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, EP-01-CV-441-DB, is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, (03-50060)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on October 7, 2003. (App. 1a-2a). Jurisdiction is invoked under 28 U.S.C. §1254(1)

STATUTUES AND REGULATIONS INVOLVED

Section 502(a)(1)(B) of the Employee retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132(a)(1)(B) contains provisions relating to the enforcement of actions by litigants seeking to recover ERISA benefits.

STATEMENT OF THE CASE

ISABEL HERNANDEZ brought this ERISA action, as the widow and beneficiary of HECTOR HERNANDEZ, an employee for El Paso Corporation, who passed away after he received notice of termination of employment. She is seeking to recover severance payments under a plan established by the employer for the benefit of the employees once a merger occurred and notice of termination of employment had been provided to eligible employees.

District Court Proceedings

On October 23, 2001, Plaintiff filed a lawsuit against El Paso Corporation in state Court alleging several

causes of action, promissory estoppel, specific performance, quantum meruit, and intentional infliction of emotional distress. The case was removed to Federal Court as an ERISA cause of action. El Paso Corporation filed a Motion for Summary Judgment. Two conditions are required under the Plan in order for employees to become eligible for benefits: (1) change in control and (2) within two years thereafter, the participant's employment with the company terminates.

The employer, initially denied that change in control had occurred but later conceded said point. However, the employer, disputed the second condition. El Paso Corporation argued to the Court that a notice of termination was never sent to Mr. Hector Hernandez.

The District Court found, however, that the memorandum sent to Mr. Hernandez constituted a Notice of Termination. The Court, however, without stating what standard of review was used to evaluate the administrator's denial of severance payments to Ms. Hernandez, found that "the Plan Administrator correctly interpreted the language of the Plan..." The Court reason that the Plan Administrator correctly interpreted the Plan by determining that Mr. Hernandez' employment was the reason of his death, thereby precluding receipt of severance payments under Section 4.1(a) of the Plan.

Court of Appeals Decision

The Fifth Circuit, in a per curiam opinion by Justice Reavley, Jolly and Dennis affirmed Judge Briones' decision. The Court of Appeals agreed with the District Court that the Plan Administrator made a legally correct interpretation of the Plan document in denying severance benefits where the beneficiary died, before his employment

otherwise terminated as a result of a scheduled reduction in force that followed a change in control."

The Court of Appeals, as the District Court had done below, failed to state what standard of review was applied to evaluate the Administrator's denial of benefits and interpretation of terms under the Plan.

The Court of Appeals recognized that El Paso Corporation conceded below that the de novo standard is applicable, but affirmed the Administrator's decision because there were no material issues of fact in dispute and the Administrator's interpretation of the Plan was legally correct."

The Court failed to show that it applied any analytical framework to evaluate the denial of benefits to the beneficiary.

As a general rule, the Circuits have established the legal precedent that the de novo standard of review is applicable in evaluating the Plan Administrator's decision unless the Plan gives the Administrator authority to determine eligibility for benefits or to interpret the terms of the Plan.

The Fifth Circuit has laid-out an analytical framework applicable to cases where the Plan gives authority to the Plan Administrator to determine eligibility of benefits. The Court of Appeals refers to this deferential standard of review as an arbitrary and capricious review or an abuse of discretion standard. The less deferential de novo standard is applicable where the Administrator lacks discretion to determine eligibility of benefits or to construe the terms of the Plan.

Under the abuse of discretion standard of review, the Court conducts a two-step process: (1) the Court will determine whether the Administrator's interpretation was legally correct and (2) it if was not legally correct, the Court must determine if the Administrator abused his discretion.

In determining whether the Administrator's interpretation was legally correct, it conducts a three-step inquiry: (1) uniformity in the construction of the Plan (2) was the interpretation of the Plan consistent with a fair reading of the Plan and (3) costs resulting from different interpretation of the Plan.

Under the abuse of discretion analysis, the Court follows a three-step sequential inquiry: (1) internal consistency of the Plan under the Administrator's interpretation (2) any relevant regulations formulated by the appropriate agencies, and (3) the factual background in making the determination and any showing of lack of good faith by the Plan Administrator.

Both the Court of Appeals and the District Court failed to state what standard of review is applicable to this case and to apply any analytical framework, under the de novo review or abuse of discretion of discretion standard.

This Court has determined that Courts have to apply the proper standard of review in cases where the Administrator makes a determination of eligibility of benefits.

It is insufficient for the Courts below to uphold an Administrator's denial of benefits by concluding that the Administrator's interpretation of the Plan was legally correct.

ARGUMENT

I. A FINDING THAT THE ADMINISTRATOR'S INTERPRETATION OF AN ERISA PLAN IS LEGALLY CORRECT IF HIS INTERPRETATION WAS FAIR AND REASONABLE IS NOT THE PROPER ANALYTICAL FRAMEWORK REQUIRED UNDER A DE NOVO STANDARD OF REVIEW.

The law is well-established that "a denial of benefits challenged under §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), is reviewed under a de novo standard unless the Plan gives the Administrator 'discretionary authority' to determine eligibility for benefits or to construe the terms of the Plan." *Wilbur v. Arco Chemical Co.,* 974 F.2d 631, 636 (5th Cir. 1992) cf. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956 103 L.Ed. 2d 80 (1989). "On the other hand, discretionary authority cannot be implied." *Chevron Chemical Co. v. Oil, Chemical and Atomic Workers Local Union* 4-447, 47 F.3d 139, 142 (5th Cir. 1995) cf. *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558-59, cert. denied, 498 U.S. 1087, 112 L.Ed. 2d 1051, 111 S.Ct. 964 (1991).

"...before ERISA's implementation, Courts gave deference to Administrator's decisions when the terms of the instrument provided for discretionary authority." *Lowry v. Bankers Life and Casualty Retirement Plan*, 871 F.2d 522, 524 (5th Cir. 1989).

"The Bruch Court made clear that the wholesale importation of an arbitrary and capricious standard of review in 1132(a)(1)(B) actions erroneously afforded less protection to employees and their beneficiaries that they

enjoyed before ERISA was enacted." Id. cf. *Firestone Tire & Rubber Co.*, Supra, 109 S.Ct. at 956.

In the case at bar, the El Paso Natural Gas Company Employee Severance Protection Plan did not grant discretionary authority to the Plan Administrator to determine eligibility of benefits to interpret the forms of the Plan. The Court of Appeals pointed out that "[t]he parties point to no language giving the Administrator discretionary authority and Appellee's conceded below that the de novo standard is applicable.

Thus, the District Court and the Court of Appeals were required to apply a de novo standard of review. "However, [Hernandez'] factual determination during the course of [Hernandez'] benefit proceeding are reviewed for abuse of discretion." *Lain v. Unum Life Insurance Company of America*, 279 F.3d 337, 342, (5th Cir. 2002) cf. *Estate of Bratton v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 215 F.3d 516, 522 (5th Cir. 2000) (quoting *Salley v. E.I. Dupont de Nemous*)

The abuse of discretion standard is reviewed de novo. Id. p. 343. "However, this Court 'will set aside the district court's factual findings underlying its review of the [policy] Administrator's determination only if clearly erroneous." *Lain*, Supra, p. 243.

The Fifth Circuit applies a two prong test, in reviewing a denial of benefits and interpretation of the terms of the Plan by the Trust in a de novo review. "Because the language in the policy does not give Unum such discretion, we apply the de novo standard of review." *Lain*, Supra, p. 342.

In a de novo review, the Circuit Court must "[f]irst determine the legally correct interpretation of the [policy]." Id. 344 cf. *Tolson v. Avondale Industries, Inc.*, 141 F.3d 604, 608 (5th Cir. 1998) "If it is found that the Administrator failed to give the Plan 'the legally correct interpretation, [this Court must] then determine whether the Administrator's decision was an abuse of discretion. *Lain*, Supra, p. 344.

In an abuse of discretion standard of review, the Fifth Circuit applies the same two-step review process that the Court applies in a de novo review. "Application of the abuse of discretion standard may involve a two-step process. First, a Court must determine the legally correct interpretation of the Plan." If the Administrator did not give the Plan the legally correct interpretation, the Court must then determine whether the Administrator's decision was an abuse of discretion." *Chevron Chemical Co.*, Supra, 145 cf. *Wildbur*, Supra p. 637; accord, e.g. *Jordan Camera Iron Works, Inc.*, 900 F.2d 53, 56 (5th Cir.), Cert. denied, 498 U.S. 939, 112 L.Ed 2d 308, 111 S.Ct. 344 (1990). Review under both standards is identical.

The Court, in a de novo review, then proceeds with a three-step process to determine if the Administrator's interpretation of the Plan was legally correct. The Court considers (1) whether a uniform construction of the policy has been give by the Administrator (2) whether the interpretation is fair and reasonable, and (3) whether unanticipated costs will result from a different interpretation of the policy. *Lain*, Supra p. 344.

The identical three-step approach is applied to the abuse of discretion standard. See, *Chevron Chemical Co.*, Supra, p. 145.

Clearly, applying the same analytical framework to the novo standard of review and the abuse of discretion of review is not what this Court intended in *Firestone*, Supra. Justice O'Connor stated this point succinctly. She wrote:

> "ERISA was enacted 'to promote the interests of the employees and their beneficiaries in employee benefit plans,' *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed 2d 490 (1983), and to protect contractually defined benefits,' *Massachusetts Mutual Life Insurance, Co. v. Russell* 473 U.S. at 148, 105 S.Ct. at 3093. See generally 29 U.S.C. §1001 (setting forth congressional findings and declarations of policy regarding ERISA) Adopting *Firestone's* reading of ERISA would impose a standard of review that would afford less protection to employees and their beneficiaries than they employed before ERISA was enacted." *Firestone Tire & Rubber Co.*, Supra 109 S.Ct. at 956.

The Court emphasized that the de novo standard was to be used, unless the fiduciary was granted discretionary authority, because "[a]s this case aptly demonstrates, the validity of a claim to benefits under ERISA Plan is likely to turn on the interpretation of terms in the Plan at issue." Id. p. 956.

The Fifth Circuit by failing to use a separate standard in a de novo review than an abuse of discretion review essentially is affording less protection to beneficiaries of the Plan before Congress enacted ERISA.

In the case at bar, the District Court and the Court of Appeals failed to state what standard of review was applied in determining whether the Administrator's decision was legally correct.

The District Court set-up its analytical framework to reach its conclusion that the interpretation of the right to severance benefits was legally correct. First, the Court found that "the Courts must interpret ERISA plans provisions as they are likely to be understood by the average plan participant." *Letourneau Lifelike Orthotics & Prosthetics, Inc., v. Wal-Mart Stores, Inc.*, 298 F.3d 348, 351-52 (5th Cir. 2002) (citing *Walker v. Wal-Mart Stores, Inc.*, 59 F.3d 938, 940 (5th Cir. 1998). Secondly, the District Court stated that: "[f]urthermore, ERISA provisions must be interpreted accordingly to their plain meaning." *Nichel v. Estate of Estes*, 122 F.3d 294, 295 (5th Cir. 1997). And thus, the Court concluded that: "[i]n applying these rules, the Court finds that the Plan Administrator correctly interpreted the language of the Plan, resulting in a proper denial of severance benefits to Mrs. Hernandez. See, District Court opinion at p. 7. The Court of Appeals approved the District Court's analytical framework. It stated: "[w]e agree with the District Court's analysis of the relevant plan provisions. See, Court of Appeals decision, p. 2.

It is questionable whether the analytical framework established by the Fifth Circuit would survive a challenge in the light of the enunciations that the Supreme Court made in *Firestone Tire & Rubber Co.*, Supra, in that identical analytical framework is used in both standards of review.

Assuming arguendo, that the analytical process used by the Fifth Circuit would satisfy the requirements of

Firestone, nonetheless, in the case at bar, both the Fifth Circuit Panel and the District Court failed to apply its own analytical framework. The Court was required to consider: (1) whether the Administrator has given the Plan a uniform construction. The Court did not specifically indicate that it was following the analytical framework required in *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) ("the genesis of this two-step, multi-part analysis appears in *Dennard*," Supra,) *Wildbur*, Supra. p. 637.

The Court was required to determine whether the El Paso Corporation Administrator's interpretation of the Plan was consistent with fair reading of the Plan. See, *Chevron Chemicals Co.*, Supra, p. 145. The District Court agreed with the Administrator's interpretation because "[it] would go against the plain meaning of the language of the plan and Plaintiff is not entitled to such treatment." See, opinion at p. 9.

In *Firestone*, this Court disapproved the inquiry of whether the Administrator's interpretation was consistent with a fair reading of the Plan, in a de novo review. "A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." Id. 109 S.Ct. at 954 However, this applies to cases where "the administrator has the power to construe uncertain terms or that eligibility determinations are to be given deference. Thus, it is doubtful that the Fifth Circuit test will withstand a challenge under *Firestone*. A fair reading test is more like an abuse of discretion review and not a de novo review where "an administrator has no discretion to determine eligibility or interpret the Plan unless the plan language expressly confers such authority on the administrator." *Wildbur*, Supra, at p. 636. Cf. *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558 (5th Cir. 1990),

Cert. denied, _U.S._111 S.Ct. 964, 112 L.Ed. 2d 1051 (1991).

The Court was incorrect in that it "agreed with the District Court that the Plan Administrator made a legally correct interpretation of the Plan in denying severance benefits where the beneficiary died, before his employment otherwise terminated as a result of a scheduled reduction in force that follow a change in control." Moreover, the Court of Appeals, misapprehended the facts of the case in that it determined that "[t]he language of Sections 4.1 and 5.2 of the Plan provide that severance benefits are not available in such circumstances." Opinion p. 2.

The employer's Plan was established in recognition that a merger or takeover might occur in the future. The Plan provided that a beneficiary of the Plan was entitled to receive benefits "if (i) a change in control has occurred and (ii) within two years thereafter, the participant's employment with the company terminates."

The first condition was satisfied on October 25, 1999 when the Defendant merged with Sonat, Inc. The second condition was met when the employer sent Mr. Hernandez a notice of termination that set May 31, 2001 as the tentative date of termination. It stated that he was eligible for benefits in the amount of $87,205.19.

Mr. Hernandez died of cardiac arrest prior to May 31, 2001, the date of termination. The Plan Administrator denied severance benefits to Ms. Isabel Hernandez because Mr. Hernandez' employment with El Paso Corporation terminated on January 26, 2001, as a result of his death."

The District Court found that the Administrator applied the legally correct interpretation of the Plan. The

District Court deferred to the Administrator's interpretation, contrary to the mandate of *Firestone*, Supra. In *Firestone*, the Court made it clear that where the document does not grant the Administrator's discretion to interpret the Plan, only the Courts have said authority. However, in this case, the Courts below deferred to the Administrator's interpretation because it was legally correct.

If the Court of Appeals and the District Court had done a de novo interpretation of the Plan, it may have come out with a different conclusion. For instance, the Administrator denied benefits because the language of Section 4.(1)(a)(D) stated that a participant is ineligible to receive severance benefits if his employment terminates...by reason of the participant's death. However, this was clearly an incorrect interpretation of the Plan in that Mr. Hernandez' termination of employment occurred when he received his notice of termination, not when he died. By sending the notice of termination, the employer had terminated his employment with the company making May 31, 2001, the effective date of termination.

The Plan contains a provision whereby the termination date may change, after employment has been terminated, if the employee dies before the effective date of termination.

In the event that the person dies, his effective date of termination is his date of death. Section 5.2(b) of the Plan states as follows:

> "In the case of the participant's death, the participant's termination date shall be his or her date of death. In all other cases, the

> participant's termination date shall be the date specified in the notice of termination..."

In other words, the correct legal interpretation of the Plan is that Mr. Hernandez could not have received severance payments if he had died before his notice of termination was given. However, if the notice of termination was given making May 31, 2001 the effective date of termination, Section 4.1 is inapplicable. Instead, Section 5.2(b) applies because he was terminated effective May 31, 2001. Section 5.2(b) makes it clear that in those circumstances, his effective date of termination changes to his date of death.

The District Court was incorrect in its analysis in that the Administrator, in their Summary Judgment Motion, stated that Section 5.2(b) "only applies in the event that a participant either (1) received a Notice of Termination, or provided a valid notice of termination to El Paso."

Section 5.2(b) was clearly applicable in that Mr. Hernandez had received a notice of termination prior to his death. The Court of Appeals was incorrect in stating that Section 5.2 provided that severance benefits were not available in such circumstances. And the District Court failed to reconcile Section 5.2 with Section 4.1 of the Plan together. It merely focused on Section 4.1 of the Plan which was clearly inapplicable under these circumstances. Every term in the Plan is there for a purpose. The Administrator's interpretation of the Plan makes section 5 of the Plan superfluous, a surplusage, a term without meaning or purpose.

The interpretation of the Plan by the lower Courts and the Administrator was clearly incorrect. "ERISA was enacted to 'promote the interests of the employees and their

beneficiaries in Employees benefit plans,' *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and to protect contractually defined benefits." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) cf. *Firestone Tire & Rubber*, Supra, 489 U.S. 101, 114 (1989).

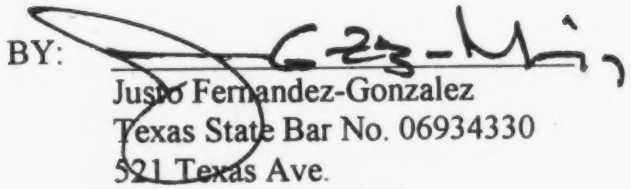
Thus, the Court of Appeals' determination that Section 4.1 and 5.2 of the Plan provided that no severance benefits were available was not legally correct. Moreover, the Court of Appeals failed to apply the analytical framework required under a de novo standard of review established by the Court. A finding that the trustee's interpretation was fair and reasonable is consistent with an abuse of discretion and not a de novo standard of review, which gives less deference to the trustee's opinion.

CONCLUSION

The analytical frameworks established by the Fifth Circuit is identical in a de novo review and abuse of discretion standard of review. Under said framework, the Courts are deferring to the Administrator's interpretation of the Plan. The Administrator's interpretation of the Plan will withstand a challenge so long as the Court finds that the Administrator's interpretation is "fair and reasonable." This framework is proper for an abuse of discretion standard of review. It defers to the trustee's opinion.

A de novo review does not allow the trustee to interpret the terms of the Plan. The Courts are the only ones empowered to interpret the Plan, where, as here, the document does not grant the trustee discretion to intepret the terms of the Plan. Thus, the process used by the Fifth Circuit is contrary to the intent of ERISA: to promote and protect the interest of the beneficiaries under the Plan.

Respectfully submitted,

BY: 

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APPENDIX "A"

United States Court of Appeals
Fifth Circuit
FILED
October 7, 2003
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURTOF APPEALS FOR THE FIFTH CIRCUIT

No. 03-50060
Summary Calendar

ISABEL HERNANDEZ, For Herself and on behalf of Hector Hernandez' Estate,

Plaintiff-Appellant,

versus

EL PASO ENERGY CORPORATION, (NOW KNOWN AS EL PASO CORPORATION); EL PASO NATURAL GAS COMPANY EMPLOYEE SEVERANCE PROTECTION PLAN,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas
(USDC No. EP-Ol-CV-441-DB)

Before REAVLEY, JOLLY and DENNIS, Circuit Judges.
PER CURIAM: *

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5THCIR. R. 47.5.4.

Appellant Hernandez sued for severance benefits allegedly due her deceased husband. The relevant facts are not in dispute. We agree with the district court that the plan administrator made a legally correct interpretation of the plan document in denying severance benefits where the beneficiary died, before his employment otherwise terminated as a result of a scheduled reduction in force that followed a change in control. The language of sections 4.1 and 5.2 of the plan provide that severance benefits are not available in such circumstances, We agree with the district court's analysis of the relevant plan provisions.

The parties on appeal and the district court do not clearly indicate whether they think de novo or abuse of discretion review is applicable to judicial review of the plan administrator's decision. The de novo standard applies "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. " Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). The parties point to no language giving the administrator discretionary authority, and appellees conceded below that the de novo standard is applicable. Even under the less deferential de novo standard, we should affirm the administrator's decision if, as here, there are no material issues of fact in dispute and the administrator's interpretation of the plan was legally correct. See Dial v. NFL Player Supplemental Disability Plan, F.3d 606, 613 (5th Cir. 1999).

AFFIRMED.

APPENDIX "B"

FILED
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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY /S/
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ISABEL HERNANDEZ. for	§	
herself and on behalf of	§	
HECTOR HERNANDEZ'S	§	
ESTATE,	§	
Plaintiff.	§	
v.	§	EP-01-CA-441-DB
	§	
EL PASO ENERGY	§	
CORPORATION (now known	§	
as EL PASO CORPORATION),	§	
and EL PASO NATURAL GAS	§	
COMPANY EMPLOYEE	§	
SEVERANCE PROTECTION	§	
PLAN (now known as THE EL	§	
PASO ENERGY CORPORATION	§	
EMPLOYEE SEVERANCE	§	
PROTECTION PLAN),	§	
Defendants.	§	

FINAL JUDGMENT

On this day, the Court entered an Order granting summary judgment in favor of Defendants El Paso Corporation and El Paso Energy Corporation Employee Severance Protection Plan, dismissing Plaintiff Isabel

Hernandez's cause of action, filed for herself and on behalf of Hector Hernandez's Estate. The Court now enters Final Judgment pursuant to Federal Rule of Civil Procedure 58.

Accordingly, **IT IS HEREBY ORDERED** that the "Motion for Complete Summary Judgment" filed by Defendants EI Paso Corporation and E1 Paso Energy Corporation Employee Severance Protection Plan is GRANTED.

IT IS FURTHER ORDERED that Plaintiff Isabel Hernandez's cause of action against Defendants E1 Paso Corporation and El Paso Energy Corporation Employee Severance Protection Plan is **DISMISSED WITH PREJUDICE.**

IT IS FINALLY ORDERED that all other pending motions. if any. are **DENIED as MOOT.**

SIGNED this 20th day of December, 2002.

/S/
THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY /S/
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ISABEL HERNANDEZ. for herself and on behalf of HECTOR HERNANDEZ'S ESTATE, Plaintiff.	§	
v.	§	EP-01-CA-441-DB
EL PASO ENERGY CORPORATION (now known as EL PASO CORPORATION), and EL PASO NATURAL GAS COMPANY EMPLOYEE SEVERANCE PROTECTION PLAN (now known as THE EL PASO ENERGY CORPORATION EMPLOYEE SEVERANCE PROTECTION PLAN), Defendants.	§	

MEMORANDUM OPINION AND ORDER

On this day, the Court considered a "Motion for Complete Summary Judgment," filed n the above-captioned cause on October 22, 2002, by Defendants El Paso

Corporation and El Paso Energy Corporation Employee Severance Protection Plan. Plaintiff Isabel Hernandez filed a Response on November 1, 2002. On November 12, 2002, Defendants filed a Reply. After due consideration, the Court is of the opinion that Defendants' Motion should be granted *for* the reasons that follow.

FACTS

Plaintiff Isabel Hernandez is a resident of Paso, Texas. Defendant EI Paso Corporation is a corporate citizen organized under the laws of the State of Texas with its principal place of business in Houston, Texas.

Hector Hernandez was employed by El Paso Natural Gas Company ("EPNG" or the "Company") from May 5, 1980, until the day he died of a cardiac arrest on January 26.2001. During his employment with EPNG, Mr. Hernandez became a participant in the El Paso Energy Corporation Employee Severance Protection Plan (the "'Plan"). The Plan was established in 1992 by El Paso Energy Corporation, EPNG's corporate parent, to provide financial support and the continuation of certain benefits for eligible employees. Under Section 4.1(a) of the Plan, a participant is entitled to receive severance benefits if:

(i) a Change in Control[1] has occurred and (ii) within two years thereafter, the Participant's employment with the Company terminates for any reason, except that notwithstanding the provisions of this paragraph, no benefits under this Plan are payable should the Participant's termination of employment be (A) for Cause, (B) by reason of Peffi1anent Disability, (C) vo1untarily initiated by the

[1] Section 2.6 of the Plan lists various situations that constitute a change in control. A merger or consolidation approved by E1 Paso Energy Corporation's stockholders constitutes a change in control.

Participant for other than Good Reason, or (D) by reason of the Participant's death.

On October 25, 1999, EI Paso Energy Corporation merged with Sonat Inc. (the "Sonat Merger). The Sonat Merger constituted a change in control according to Section 2.6 of the Plan. Subsequently, on January 18,2000, EI Paso Energy Corporation announced that it would merge again with The Coastal Corporation (the "Coastal Merger").

In anticipation of the Coastal Merger, EPNG provided all employees located in E1 Paso, Texas, including Mr. Hernandez, with two memorandums. The first memorandum, dated September 22, 2000 (the "First Memorandum"), stated that EPNG planned to transfer the majority of its operations in EI Paso, Texas, to Colorado Springs, Co1orado, where a subsidiary of The Coastal Corporation, the Colorado Interstate Gas Company ("CIG"), was located. The planned consolidation and transfer of the EI Paso operations, according to the memorandum, was contingent on receiving FTC approval of the Coastal Merger. The First Memorandum also stated that some El Paso-based employees would be offered other jobs in El Paso, and asked employees to indicate whether they would like to be considered for a position with EPNG/CIG in Colorado Springs in the event there were no positions available for them in El Paso, Texas. Mr. Hernandez communicated to his employer that he did not want to be considered for a position with EPNG/CIG in Colorado Springs.

The second memorandum, dated January 2001 ("Second Memorandum"), advised Mr. Hernandez that his termination date was tentatively set for May 31, 2001. Therein, El Paso Energy Corporation ind1cated that it was providing "written Notice of Termination" to Mr. Hernandez as a participant of the Plan, pursuant to the Company's "reduction-ill-force program" occurring within two years of the change in control, which resulted from the Sonat Merger. Thereafter, on January 26, 2001, Mr. Hernandez died of a cardiac arrest. El Paso Energy

Corporation merged with The Coastal Corporation, and on May 31,2001, El Paso Energy Corporation closed its operations in El Paso, Texas.

Plaintiff Isabel Hernandez, Mr. Hernandez's widow, made a request for severance benefits under the Plan. The Plan Administrator denied Mrs. Hernandez's request on the grounds that under the Plan, no benefits are payable should the participant's employment terminate by reason of the participant's death.

On October 23, 2001, Plaintiff commenced this lawsuit in the El Paso County Court at Law Number Seven alleging several theories of recovery based on Defendants' refusal to pay the severance benefit, including: promissory estoppel, specific performance, quantum meruit, and intentional infliction of emotional distress. Defendants timely removed the Cause to this Court on November 30, 2001, alleging federal question jurisdiction pursuant to 28 U.S.C. § 1331. On August 1, 2002, Plaintiff filed her First Amended Complaint requesting relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29U.S.C.§101 *et seq.*, challenging the denial of severance benefits by tile Plan Administrator under 29U.S.C. §1132(a)(1)(B). Plaintiffs seek severance benefits under the Plan, attorney fees, costs, arid interest. The instant Motion for Complete Summary Judgment was filed on October 22, 2002.

AUTHORITIES

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with tlle affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party that moves for summary judgnlent bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact.

See. e.g, Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91L. Ed. 2d 265 (1986). "If the moving part fails to meet this burden, the motion must be denied, regardless of the nonmovant's response." *Tubacex, Inc.* v. *M/v Risan,* 45 F.3d 951, 954 (5th C1r. 1995). If the movant does meet this burden, however, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324, 106 S. Ct. at 2553. The party opposing a motion supported by evidence cannot discharge his burden by alleging mere legal conclusions. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). Instead, the party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* "If the non-movant fails to meet this burden, then summary judgment is appropriate. " *Tubacex,* 45 F.3d at 954. When making a determination under Rule 56, factual questions and inferences are viewed in a light most favorable to the nonmovant. *Lemelle* v. *Universal Mfg. Corp.,* 18 F .3d 1268, 1272 (5th Cir. 1994).

Title 29 U.S.C. § 1132(a)(1)(B} allows a participant or beneficiary of a plan governed by ERISA to bring a civil action to recover benefits under the plan, to enforce his rights under the plan, or to clarify his rights to future benefits. 29 U.S.C.A. § 1132(a)(1)(B) (West. 1999). A court will review the denial of ERISA benefits using a *de novo* standard, unless the plan administrator or fiduciary has discretion in determining eligibility for benefits or in construing the terms of the plan. *Firestone Tire and Rubber Co. v. Bruch.* 489 U.S. 101, 115,109 S. Ct. 948, 957, 103 L. Ed. 2d 80 (1989)

DISCUSSION

In their Motion for Complete Summary Judgment, Defendants contend that the Plan Administrator correctly interpreted the Plan when he denied Mrs. Hernandez's request for benefits. Consequently, Defendants aver that there is no genuine issue of material fact and that they are

entitled to judgment as a matter of law. The Court concurs with Defendants.

1. Issues of Material Fact

The first matter that is disputed by the Parties is whether the Company issued a Notice of Termination to Mr. Hernandez, a prerequisite if the ternl1nation of employment is by the Company. Section 5.1 states that "[a]ny purported termination of employment, either by the Company or by the Participant, shall be communicated by written Notice of Termination to the other."

The Court finds as a matter of law that the Second Memorandum constitutes a Notice of Termination. The first paragraph of the Memorandum states clear1y that it is a "written Notice of Termination," Furthermore, contrary to what Defendants maintain, the Memorandum meets the definition of a Notice of Termination as set out in Section 2.11 of the Plan. Under that section, a Notice must indicate the specific provisions of the Plan relied upon as the basis for termination and shall set forth the facts and circumstances providing the basis for termination. The Second Memorandum contains both requirements. First, the Memorandum alludes to Section 4.1 (a) as the provision relied upon when it states that the Notice is issued pursuant to the termination of employment occurring within two years of the change in control of El Paso Energy Corporation. Second, the facts and circumstances providing the basis for termination are the labor-reduction efforts referred to in the first paragraph of the Memorandum. Thus, the Court finds as a matter of law that the Second Memorandum constitutes a Notice of Termination.

The second matter in dispute is whether the two requirements under Section 4.1 (a), the "Right to Severance Benefit" section, have been satisfied in order for severance payments to become due: (1) a change in control of El Paso Energy Corporation must have occurred, and (2) Mr. Hernandez's employment with the Company terminated for any reason, other than the ones exempted.

The first of these requirements is not in dispute. Defendants, in their Second Memorandum to Mr. Hernandez, concede that the Sonat Merger constituted a change in control: "This written Notice of Termination is provided pursuant to the Company's reduction-in-force program occurring *within two years of the June 10,* 1999 *Change in Control* of El Paso Energy Corporation." (emphasis added).

The Parties disagree, however, on whether the second requirement was met. Defendants maintain that Mr. Hernandez's termination of employment was by reason of his death, making him ineligible for severance benefits according to Section 4.1(a). Plaintiff counters that Mr. Hernandez's employment was terminated, not by his death, but by the Company as a result of the reduction-in-force program, in which case severance benefits would be payable under Section 4.1(a).

Thus, the only material issue remaining is whether the Plan Administrator correctly interpreted the Plan by determining that Mr. Hernandez's termination of employment was by reason of his death, thereby precluding receipt of severance payments under Section 4.1 (a). If so, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

2. Interpretation of the "Right to Severance Benefit" Section

The courts "must interpret ERISA plans' provisions as they are likely to be 'understood by the average plan participant," *LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.*, 298 F .3d 348. 351-52 (5th Cir. 2002) (citing *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5th Cir. 1998)). Furthermore, ERISA plan provisions must be interpreted according to their plain meaning. *Nickel v. Estate of Estes*, 122 F.3d 294, 298 (5th Cir. 1997). In applying these rules, the Court finds that that

Plan Administrator correctly interpreted the language of the Plan, resulting in a proper denial of severance benefits to Mrs. Hernandez.

The language Section 4. 1 (a)(D) makes it clear that a Participant is not entitled to severance benefits should the Participant's employment terminate by reason of the Participant's death. The Second Memorandum provided to Mr. Hernandez contained a Notice of Termination, which set May 31,2001, as the date of termination, Thus, Mr. Hernandez's employment was to continue through May 31,2001, However, his death on January 26,2001, became a superseding event that terminated his employment. In other words, had Mr. Hernandez not died, he could have continued his employment with the Company until May 31, 2001. His death on January 26,2001, therefore, triggered Section 4.1(a)(D).

Plaintiff counters that Defendants' reliance on Section 4.1 (a)(D) is misplaced. She contends that Mr. Hernandez's employment terminated by reason of the Company's reduction in labor force efforts, and not by his death. In support of her position. Plaintiff cites Section 5.2 of the Plan, which states in relevant part:

"Termination Date"
In the case of the Participant's death, the Participant's Termination Date shall be his or her date of death. In all other cases, the Participant's Termination Date shall be the date specified in the Notice of Termination....

Plaintiff acknowledges that the Company gave Mr. Hernandez a termination date, effective May 31, 2001, but argues that under Section 5.2, his death on January 26, 2001, became the new termination effective date. The Court does not agree with Plaintiff's interpretation of the language of the Plan.

Section 5.2 makes reference only to what constitutes a date of termination. Nothing in that section, or in any

other section of the Plan, or in the Notice ofTem1ination given to Mr. Hernandez, indicates that if the Participant's death occurs after a Notice of Termination is given and prior to the date of termination set forth in the Notice, such termination of employment will not be considered by reason of a Participant's death under Section 4. 1 (a)(D). Mr. Hernandez's death, four months prior to the scheduled date of termination, triggered Section 4.1 (a)(D). To disregard the language of Section 4.1 (a)(D), which precludes severance payments should the employment terminate by reason of the participant's death, would be to go against the plain meaning of the language of the Plan, and Plaintiff is not entitled to such treatment. *McGrath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670 (7th Cir. 1993) (plaintiff "does not have a *right* to treatment that is contrary to the terms of the p1an"). The Court finds that Section 4.1(a)(D) clearly and unambiguously precludes Plaintiff from receiving any severance benefits under the Plan.

Defendants, therefore, have succeeded in showing that no genuine issue of material tact exists as to Plaintiff's eligibili1y for severance benefits. Plaintiff has failed to provide sufficient evidence to buttress her assertion that the Plan Administrator incorrectly interpreted the provisions of the Plan. Consequently, Defendants are entitled to judgment as a matter of law.

Accordingly, **IT IS HEREBY ORDERED** that the "Motion for Complete Summary Judgment," filed by Defendants E1 Paso Corporation and El Paso Energy Corporation Employee Severance Protection Plan is **GRANTED.**

SIGNED this 20th day of December, 2002.

/S/
THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

(2)

No. 03-1333

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ISABEL HERNANDEZ FOR HERSELF AND ON BEHALF OF HECTOR HERNANDEZ' ESTATE,

Petitioners,

v.

EL PASO ENERGY CORPORATION (NOW KNOWN AS EL PASO CORPORATION), AND THE EL PASO NATURAL GAS COMPANY EMPLOYEE SEVERANCE PROTECTION PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the United States Supreme Court, Respondents disclose the following:

1. Respondent El Paso Corporation is a publicly traded corporation. El Paso Corporation has no parent corporation.

2. Pacific Financial Research, Inc. (PFR) owns approximately 12.6 percent of the stock of El Paso Corporation. PFR is a wholly owned subsidiary of United Asset Management Corporation, which is a wholly owned subsidiary of Old Mutual plc, a United Kingdom based financial services group. Old Mutual plc is publicly traded.

3. Respondent The El Paso Natural Gas Company Employee Severance Protection Plan was superceded by The El Paso Energy Corporation Employee Severance Protection Plan. That Plan is an employee welfare benefit plan sponsored by El Paso Corporation, and that benefit plan has no parent corporation.

STATEMENT OF THE CASE

Hector Hernandez died while employed by El Paso Natural Gas Company. His widow applied for severance benefits under the El Paso Energy Corporation Employee Severance Protection Plan ("the Plan"). The Plan is an employee welfare benefit plan subject to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461. The Plan provided severance benefits to eligible participants whose employment terminated under specified circumstances within two years after a change in control. The Administrator of the Plan denied the claim made by Mrs. Hernandez.

The material facts are:

1. On October 25, 1999, El Paso was a party to a merger constituting a change in control within the meaning of the Plan;

2. In January of 2001, El Paso notified Hector Hernandez that his layoff was tentatively scheduled to occur on May 31, 2001;

3. On January 26, 2001, Hector Hernandez died.

The pertinent provisions of the Plan provide:

Section 4.1 Right to Severance Benefit

(a) A Participant shall be entitled to receive from the Company a Severance Benefit in the amount provided in Section 4.2 if (i) a Change in Control has occurred and (ii) within two years thereafter, the Participant's employment with the Company terminates for any reason, except that notwithstanding the provisions of this paragraph (a), no benefits under this Plan are payable should the Participant's termination of employment be . . . (D) by reason of the Participant's death.

Section 5.2 Termination Date

In the case of the Participant's death, the Participant's Termination Date shall be his or her date of death. In all other cases, the Participant's Termination Date shall be the date specified in the Notice of Termination. . . .

ARGUMENT

The premise underlying the Petition for Writ of Certiorari is that the District Court failed to apply the *de novo* standard of review when determining whether the Plan Administrator properly rejected the application for severance benefits. That premise is based on the argument (i) that the District Court found that the Plan Administrator's interpretation of the plan provisions was "fair and reasonable," and therefore (ii) the District Court did not apply the *de novo* standard. There is, however, nothing in the District Court's Memorandum Opinion and Order that indicates that the District Court upheld the Plan Administrator's interpretation because it was "fair and reasonable." Indeed, the phrase "fair and reasonable" does not appear in the District Court's Memorandum Opinion and Order.[1]

Instead, the District Court's Memorandum Opinion and Order reveals that the Court applied the *de novo* standard of review by "looking to the terms of the plan and other manifestations of the parties' intent." *Firestone Tire*

[1] The Memorandum Opinion and Order is reproduced in Appendix B to the Petition for Writ of Certiorari.

& Rubber v. Bruch, 489 U.S. 101, 113 (1989). Petitioner acknowledges that the District Court concluded that the Administrator applied the legally correct interpretation of the Plan. (Pet. at 12.) Petitioner nevertheless argues that this conclusion was the product of deference to the Administrator's interpretation. (*Id.* at 13.) Nothing in the District Court's Memorandum Opinion and Order suggests that the District Court deferred to the Plan Administrator or presumed that the Administrator's decision was correct. To the contrary, the District Court based its decision on its own *de novo* interpretation of the Plan, concluding that "Section 4.1(a)(D) clearly and unambiguously precludes Plaintiff from receiving any severance benefits under the Plan."[2] Because the Plan states that "no benefits under this Plan are payable should the Participant's termination of employment be . . . by reason of the Participant's death,"[3] the District Court correctly decided that the Plan Administrator properly denied the claim for benefits asserted by Hector Hernandez's widow because Mr. Hernandez's employment terminated upon his death.

Further, even if we assume that there is some lack of clarity about the standard of review used by the District Court, the Petitioner seeks review of the decision of the Court of Appeals, not the decision of the District Court. The Court of Appeals applied the "less deferential de novo standard" and determined that the "administrator's interpretation of the plan was legally correct."[4] Accordingly, even

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[2] See Appendix B to the Petition for Writ of Certiorari at 15a.

[3] *Id.* at 8a-9a.

[4] The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in Appendix A to the Petition for Writ of Certiorari.

if the District Court had used the wrong standard of review, the Court of Appeals did not.

Finally, Petitioner has not shown that this case involves an issue that requires this Court to clarify a point of law or resolve a split of authority among the Circuit Courts. Respondents submit that this Court should, therefore, deny the Petition for Writ of Certiorari.

CONCLUSION

The Petition for Writ of Certiorari incorrectly assumes that the lower courts failed to conduct a *de novo* review of the denial of benefits by the Administrator of the Plan. Because both the District Court and the Court of Appeals properly conducted a *de novo* review to determine the legally correct interpretation of the Plan, Respondents assert that the United States Supreme Court should deny the Petition for Writ of Certiorari filed by Isabel Hernandez.

Respectfully submitted,

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